No. 83-500

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

SANDRA H. HARTKE

Petitioner

vs.

DR. WILLIAM MCKELWAY

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

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STATEMENT OF THE CASE

This "wrongful conception" case arises out of the petitioner's conception of and giving birth to a healthy baby girl following the performance of a sterilization pro-

cedure by the respondent. The petitioner brought this action in the United States District Court for the District of Columbia sitting in diversity jurisdiction.

After a jury verdict for the petitioner on counts sounding in negligence and lack of informed consent, the District Court disallowed the award of childrearing expenses because there was no evidence that the petitioner underwent sterilization to avoid the expenses of raising another child. Hartke v. McKelway, 526 F.Supp. 97, 105 (D.D.C. 1981), reprinted in Petition for Writ of Certiorari (hereinafter "Petition") at 26 App. B. The District Court also found that the evidence was clear that the petitioner underwent sterilization for therapeutic, not economic, reasons, and that she prized the child she bore. Id., reprinted in Petition at 27 App. B. Nevertheless, the District Court upheld the jury's award of damages for the petitioner's medical expenses, pain,

suffering and mental anguish resulting from the pregnancy and childbirth. Id. at 104, reprinted in Petition at 21 App. B - 22 App. B.

On appeal, the United States Court of Appeals for the District of Columbia Circuit did not decide whether a plaintiff in a wrongful conception case may recover the expenses incurred in raising a child. Hartke v. McKelway, 707 F.2d 1544, 1552 (D.C. Cir. 1983), reprinted in Petition at 14 App. A - 15 App. A. Rather, the Court of Appeals affirmed the decision of the District Court that under the evidence presented in this case, the jury could not rationally have found that the birth of this child constituted an injury to this plaintiff and that an award of childrearing expenses would only give this plaintiff a windfall. Id. at 1557, reprinted in Petition at 26 App. A.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

A federal court, sitting in diversity jurisdiction, is considered to be another court of the state for the purpose of adjudicating the rights of the parties according to applicable state law. Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945); Angel v. Bullington, 330 U.S. 183, 187 (1947).

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." Herb v. Pitcairn, 324 U.S. 117, 125 (1944), citing, Murdock v. City of Memphis, 20 Wall. 590 (U.S. 1874), Berea College v. Kentucky, 211 U.S. 45 (1908), Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157 (1917), and Fox Film Corp.

v. Muller, 296 U.S. 207 (1935). It follows then that this Court will not review judgments of the inferior federal courts, sitting in diversity jurisdiction, that rest on adequate and independent state grounds. C.f., Miree v. DeKalb County, 433 U.S. 25, 33 (1977) (case remanded to U.S. Court of Appeals as this Court will not undertake to decide the correct outcome under state law).

In setting aside the award of childrearing expenses in the instant case, the District Court ruled that there was no evidence ". . to support the view that the petitioner had sought to avoid the expenses of raising another child". Hartke v. McKelway, 526 F.Supp. at 105, reprinted in Petition at 26 App. B. It concluded that the evidence was clear that the petitioner's sole concern in undergoing sterilization was that she had previously suffered an ectopic pregnancy and feared for her life should she become pregnant again. Id. Similarly, the Court of

Appeals characterized the evidence as "unambiguous and overwhelming" that the petitioner's reasons for undergoing sterilization were entirely therapeutic. Hartke v. McKelway, 707 F.2d at 1555 & n. 12, reprinted in Petition at 21 App. A & n. 12. The petitioner simply failed to adduce evidence that a reason for undergoing sterilization was to avoid the costs of raising a child. Id. at 1557 n. 14, reprinted in Petition at 24 App. A n. 14.

In the District of Columbia, the party asserting an issue has the initial burden of going forward with evidence as to each material element of such issue. Nader v. de Toledano, 408 A.2d 31, 48 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980).[1/] In the instant case,

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1/ In Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939), this Court held that under the doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), burden of proof is substantive and governed by applicable state law in diversity cases before federal courts.

the Court of Appeals, in ruling on the nature and sufficiency of the evidence as to damages, held that the petitioner had failed to come forward with any evidence that the birth of the child constituted an "injury" to the petitioner. Hartke v. McKelway, 707 F.2d at 1557, reprinted in Petition at 26 App. A. Thus, the common law of the District of Columbia, placing on the plaintiff the burden of producing evidence as to each element of damages, provides ample support for the disallowance of childrearing expenses under the facts of this case.

Inasmuch as the decision of the United States Court of Appeals for the District of Columbia Circuit rests on adequate and independent state grounds, this Court should deny the Petition for Writ of Certiorari.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT PRESENTS NO CONSTITUTIONAL ISSUE

The petitioner's confused and inarticulate attempt to fashion a constitutional argument out of this Court's decisions in Roe v. Wade, 410 U.S. 113 (1973) and Griswold v. Connecticut, 381 U.S. 479 (1965) is without merit. Contrary to the petitioner's contentions, the Court of Appeals did recognize that under Roe and Griswold it was required to respect the petitioner's decision to become sterile. Hartke v. McKelway, 707 F.2d at 1552-53, reprinted in Petition at 15 App. A. In fact, the Court of Appeals affirmed the District Court's allowance of damages for the petitioner's medical expenses, pain, suffering and mental anguish resulting from the pregnancy and childbirth. Id. at 1557-58 n. 16, reprinted in Petition at 26 App. A - 28 App. A n. 16. The Court of Appeals simply

held that the petitioner had not provided the evidenciary foundation to support an allowance of childrearing expenses in this case. Id. at 1557, reprinted in Petition at 25 App. A - 26 App. A.

The Court of Appeals' determination that the petitioner had not adduced evidence of injury to support childrearing expenses does not restrict or conflict with this Court's decisions recognizing the constitutional right of privacy.[2/] The Court of Appeals did not decide whether this Court's right of privacy decisions allow the plaintiff to recover, as an element of damages in all wrongful conception cases, the costs of raising the child. Id. at 1552-53, reprinted

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2/ E.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Akron v. Akron Center For Reproductive Health, Inc., 103 S.Ct. 2481 (1983); Planned Parenhood Association v. Ashcraft, 103 S.Ct. 2517 (1983); Simopolous v. Virginia, 103 S.Ct. 2532 (1983).

in Petition at 14 App. A - 15 App. A. Indeed, the Court of Appeals in dicta acknowledged that, given the appropriate evidentiary foundation, such an allowance may be required. Id. This Court's right of privacy decisions have never been held to supplant the obligation of a plaintiff, in a civil action between two private litigants, to come forward with sufficient evidence from which a jury could reasonably infer the existence of a fact to be proved. Accordingly, this Court's decisions dealing with the constitutional right of privacy are irrelevant to the question of whether the petitioner may recover childrearing expenses under the evidence presented at trial in this case.

Lastly, it should be noted that this Court has previously denied petitions for writ of certiorari in cases involving the issue presented here. Terrell v. Garcia, 496 S.W.2d 124 (Tex.App. 1973), cert. denied,

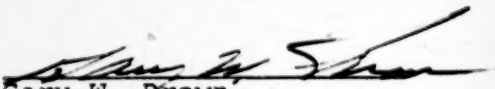
415 U.S. 927 (1974); Cockrum v. Baumgartner, 447 N.E.2d 385 (1983), cert. denied sub nom. Raja v. Michael Reese Hospital and Medical Center, 52 U.S.L.W. 3248 (U.S. October 4, 1983).

Inasmuch as the decision of the United States Court of Appeals for the District of Columbia Circuit does not incorrectly adjudge a federal right, this Court should deny the Petiton for Writ of Certiorari.

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit rests on adequate and independent state grounds and presents no constitutional issue for review by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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